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In the
Supreme Court of the United States

OCTOBER TERM, 1969

No. 8[redacted] 62

MONITOR PATRIOT CO.
NORTH AMERICAN NEWSPAPER ALLIANCE, INC.,
PETITIONERS,

v.

ROSELLE A. ROY,
EXECUTRIX OF THE WILL OF ALPHONSE ROY,
RESPONDENT.

BRIEF FOR RESPONDENT

BOIS & LAFLAMME and
MCLANE, CARLETON, GRAF,
GREENE & BROWN by
STANLEY M. BROWN,
Attorneys for Respondent
40 Stark Street
Manchester, New Hampshire

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No. 891

MONITOR PATRIOT CO.
NORTH AMERICAN NEWSPAPER ALLIANCE, INC.,
PETITIONERS,

v.

ROSELLE A. ROY,
EXECUTRIX OF THE WILL OF ALPHONSE ROY,
RESPONDENT.

BRIEF FOR RESPONDENT

Opinions Below

The opinion below on which the Petition is based is *Roselle A. Roy, Executrix of the Will of Alphonse Roy v. Monitor Patriot Co., North American Newspaper Alliance, Inc.*, 109 N.H. 441, 254 A2d 832 (1969) and is Appendix A to the Petition. A prior opinion in the same case on another point is reported as *Roy v. North American Newspaper Alliance* in 106 N.H. 92, 205 A2d 844 (1964).

Jurisdiction

Petition for certiorari, filed by petitioners, was granted February 24, 1970. The Court's jurisdiction, which is limited by the Seventh, Ninth, and Tenth Amendments to the Constitution of the United States, is under 28 U.S.C. 1257 (2).

Constitutional Provisions Involved

Since this is a review on certiorari of a State Court decision affirming a constitutionally guaranteed jury trial providing a constitutionally guaranteed remedy for injury to the character of a citizen of the sovereign State of New Hampshire, the following Constitutional provisions of the State and Federal Constitutions are involved:

Constitution of New Hampshire, Part 1 (Bill of Rights, effective June 2, 1784):

Article 7: "The people of this state have the sole and exclusive right of governing themselves as a free, sovereign, and independent state; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right, pertaining thereto, which is not, or may not hereafter be, by them expressly delegated to the United States of America in Congress assembled."

Article 12: "Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty and property . . . But no man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people.•••"

Article 14: "Every subject of this state is entitled to a certain remedy, by having recourse to the laws, *for all injuries he may receive in his* person, property, or *character*. . . ."

Article 20: ". . . In all suits between two or more persons . . . the parties have a right to a trial by jury and this method of procedure shall be held sacred, . . ."

Article 22: "The *liberty of the press* is essential to the security of freedom in a state: It ought, therefore, to be inviolately preserved."

Article 38: "A frequent recurrence to the fundamental principles of the constitution, and a constant adherence to justice . . . and all the social virtues, are indispensably necessary to preserve the blessings of liberty and good government; the people . . . have a right to require of their law-givers and magistrates, an exact and constant observance of them. . . ."

Constitution of the United States (Bill of Rights, effective as of December 15, 1791):

Seventh Amendment: "In suits at common law, . . . the right to jury trial shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Ninth Amendment: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Questions Presented

I.

Whether this Court, in disregard of the plain prohibitions of the Seventh, Ninth and Tenth Amendments to the Constitution of the United States, may nullify a constitutional jury trial providing a constitutionally guaranteed remedy for defamation, by substituting its view of the facts already found by the jury below.

II.

Whether the Court below correctly applied *New York Times v. Sullivan*, 276 U.S. 254, in affirming the Trial Court's submit-

ting, on the evidence, as a question of fact to a jury, whether making an irrelevant false charge in 1960 that a candidate for U.S. Senate was "a former small time bootlegger" in the 1920's was a publication entitled to qualified privilege under *New York Times*, or whether it was purely private libel beyond the boundaries of factual reporting on the "official conduct" of the candidate and hence beyond the scope of the *New York Times* strictures.

III.

If reached, additional questions held to be moot below in view of the result reached there are: (1) whether the *New York Times* malice of a syndicated national columnist, who indemnifies his distributors and publishers against libel, is chargeable against them, and whether, on the evidnce adduced below of such malice and the reckless disregard of the distributor and publisher in this case, "respondent may be able to present a jury issue of malice as [defined in *New York Times*]" should the case be remanded. See *Rosenblatt v. Baer*, 383 U.S. 75, at 87. In the trial below the malice of the writer Pearson was held *not* chargeable to the petitioners, to which rulings exceptions were preserved but which were not ruled upon by the New Hampshire Supreme Court.

Statement of the Case

1. *Pearson, NANA, and Monitor*:

These actions of trespass and libel were instituted in 1960 against the Monitor Patriot Co. because of its publication of the September 10, 1960 Drew Pearson column in the *Concord Monitor*. In that column Pearson, reporting on a New Hampshire Ballot Law Commission proceeding to remove "straw" candidates, charged that Alphonse Roy

> "*a former small time bootlegger*",

was responsible for procuring the filing of three other "con-

victs" as Democratic candidates for U.S. Senate, and that he had done so to aid the Republican incumbent Senator Bridges.

Monitor, being a New Hampshire corporation, was unquestionably subject to the jurisdiction of the New Hampshire court. North American Newspaper Alliance (NANA), being a foreign corporation, contested jurisdiction, but was held subject to service in *Roy v. North American Newspaper Alliance, supra.* Pearson, who largely wrote the column and was the original publisher (to NANA) was not sued because, being a non-resident individual, he was not amenable to process in New Hampshire. The underlying arrangement between Pearson, NANA and newspapers such as Monitor, was as follows (See 106 N.H. at 95, 96, 97-98):

> "The Pearson column was received by the defendant [NANA] in its New York office where it was stenciled and mimeographed and shipped to subscribing newspapers on the East Coast. ***The defendant acted as agent for authors . . . and its duties were to sell the particular feature for the author and make an accounting to him. ***Under this contract Pearson agreed to indemnify the defendant against damages arising out of libel. . . . ***The defendant could reasonably anticipate that the sale, distribution and promotion of the Pearson column . . . might entail libel actions as its contract with Drew Pearson for indemnification attests."

Under this contractual arrangement (Exhibit 21), Pearson was free to write what he pleased, NANA was under no contractual obligation to investigate the facts, and while it might question Pearson, Pearson had the final authority for column content, and NANA could refuse to publish only in violation of its contract; it was protected by the indemnification agreement. (A 172-176)

Because of this situation, the Trial Court ordered counsel for Petitioners to advise whether Pearson was in fact controlling the case as the real party in interest defendant [so that, for example his "actual malice" would be chargeable to the named defendants below, the Petitioners here], but counsel successfully avoided compliance with this order by reporting inability to determine the fact (A. 8; T. 1-144 to 155).* As a result, the indemnification feature of the contract was excluded from jury consideration (T. 8-159, Exhibit 33; T. 8-92, 93). As a further result, the Trial Court held that neither NANA nor Monitor was chargeable with Pearson's reckless disregard for truth or falsity, although allowing both to claim reliance on Pearson as a responsible reporter.

The Petitioner Monitor, unlike NANA, was free to refuse to publish defamation, and was in a position to check the facts alleged by Pearson with regard to New Hampshire matters. Thus the two Petitioners were treated somewhat differently at the trial below.

2. *The jury trial and appeal:*

The cause was tried to a jury, *Morris, J.*, presiding, with verdicts against both Petitioners being returned after 14 trial days, on December 22, 1969. The cause was argued on appeal to the New Hampshire Supreme Court in February, 1969, with the decision complained of here resulting.

Statement of Facts

1. *Alphonse Roy's reputation:*

Alphonse Roy, 69 years old when this case was tried

*In seeking an extension of time in this Court counsel for Petitioners notified the Court (Mr. Justice Brennan):

"From the outset of this litigation, Mr. Pearson controlled the action as a result of an agreement by which he undertook to indemnify the petitioners against any judgment that might be entered in favor of the plaintiff, the late Alphonse Roy."

(T. 7-62), in September of 1960 had a good general reputation as a realtor and public servant who had held responsible public offices. Born in Canada, he was reared on Manchester's West Side with little formal education, but was self-educated while working as a textile mill worker (A-244 to 246). He was elected a Representative to the New Hampshire General Court in 1924, 1926 and 1928. He was elected as Alderman of Manchester, this State's largest city, in 1931; as a member of the Governor's Council (the second highest State elective office) in 1932 and re-elected to that office in 1934. He was elected Congressman in 1936 in the disputed Jenks-Roy election, and was his Party's unsuccessful candidate against Jenks in 1938 and 1940 (A 247-249).

In 1943 Roy ran unsuccessfully for the nomination for Sheriff of Hillsborough County, in 1944 he ran again and after having apparently won, lost in a recount. He was then, in 1945, named U.S. Marshal for the District of New Hampshire in which post he served two terms until 1953. He then ran unsuccessfully for Mayor of Manchester in 1954 and for Register of Deeds in 1956. In 1958 he was his Party's nominee for Congress, but lost to the Republican in the general election. (A 249-251).

Thus Roy, in 1960, had been a responsible public officer and Democrat politician for 36 years. He had never been charged with *any* criminal act in his entire life, either as an adult or as a minor. On September 10, 1960 Pearson's column referred to Roy as:

"a former small time bootlegger".

2. *Genesis of the September 10, 1960 column:*

Pearson threw this charge at Roy in a specially timed column published the Saturday before a Tuesday primary. *The bootlegger charge was wholly false and unrelated to the political story being written, which was also, insofar as it impugned Roy, wholly false.* This is what the evidence showed:

In 1960 Roy decided in the spring to become a candidate for the Democratic nomination for Congress to which he had been nominated in 1958, and actually filed for that office on July 18. He subsequently, on July 25 withdrew from that race and filed for U.S. Senate (A 252-253).

While intending to become a candidate for Congress, sometime before July 6, Roy called Ralph LaVallee to solicit his political support. At that time LaVallee was Superintendent of the Hillsborough County Farm and was also Democratic Town Chairman in Goffstown. During the telephone call LaVallee told Roy that another Democratic politician, Frank Sullivan, was confined at the Country Farm, and when Sullivan would be released. Who brought the subject up—Roy or LaVallee—was subject to conflicting memories (A. 253-256; 201-203).

A small group of Democrats, returning from the National Convention in 1960 decided to get the "best" ticket of New Hampshire candidates possible to assist their Presidential candidate John F. Kennedy (A. 50-52). They assumed the validity of a thesis that Democrats in New Hampshire must present a "balanced ticket" with a Franco-American, an Irish-American and a Yankee (whatever that is) as candidates for the three top spots of President, Governor and U.S. Senator. Bernard Boutin was their choice for Governor, so, with Kennedy the Presidential Candidate, they needed a "Yankee" candidate for the Senate. (A. 298; T. 4-61). Herbert Hill, an amiable Dartmouth College history professor, was the candidate selected.

On the last day for filing, July 28, three candidates in addition to Roy and Hill appeared; all were residents of Manchester (as was Roy), and two at least were Irish by name. All three had minor criminal records. See Exhibits 18, 19. They were Frank Sullivan, one Robinson, and one McCarthy. Frank Sullivan had previously been a candidate for office on several occasions, having once been nominated by the Democrats for Congress (T. 6-21 *et seq*); he filed because he disliked Hill

(A. 216) and thought he could win (A. 217; T. 6-35, 55). Robinson and McCarthy were political "unknowns."

Professor Hill's campaign manager was Joseph Millimet (A. 46, 68), but Joseph Scott claimed *he* was doing the work (A. 122, 152). The Hill campaigners reacted swiftly to the influx of "non-Yankee" candidates for Senate.

On July 30 Millimet filed a petition with the Ballot Law Commission seeking to disqualify Sullivan, Robinson and McCarthy as "straw candidates."

On July 31 the Democratic State Committee was harangued that *Roy* had procured the filing of the "straws", and the State Committee announced that Hill was the only qualified candidate and the rest (including Roy) were not qualified (A. 55, Exhibit 11).

Sometime shortly after July 28 (presumably before August 4) Scott *claimed at this trial* to have met Sullivan on Elm Street in Manchester and to have chided him for having filed; whereupon, according to Scott, Sullivan pulled out a roll of bills as big as a man's fist and said "Well, see what I got for it," explaining that Roy paid him to file as a straw (A. 120-122). [Scott had never told this canard before (A. 122, 123) and Sullivan emphatically denied the story (A. 212).]

Mr. Millimet tried the Ballot Law Commission proceeding August 3 and 4, without calling Scott, although attempting to prove that Sullivan and the other two were straws, and believing that Roy had arranged their filing (See Exhibit 12, A. 56-68).

The Ballot Law Commission ruled Robinson and McCarthy off the ballot as straw candidates, but left Sullivan on, so that the final slate of candidates consisted of Hill, Roy and Sullivan [and they finished in that order (A. 210), with Senator Bridges defeating Hill in the general election].

The Democratic State Committee's endorsement of Hill on July 31, Roy's reply in kind castigating the State Committee

and Hill, and the Ballot Law Commission's hearings and rulings received wide attention in the New Hampshire press, all *during the period July 30 to August 5* (See Exhibits 11, 13, D, E, F).

Some three weeks later Drew Pearson telephoned Manchester trying to locate someone in the Hill campaign to inform him whether a Fulton Lewis report that Kennedy was financing Hill with Fifty Thousand Dollars was true (A. 83-86). Scott called back August 24 (A. 147, 152-153), said Lewis was wrong, and told Pearson substantially all of the falsehoods concerning Roy of which complaint is made here, that is, in addition to the "bootlegger" report, he told Pearson that Roy had procured the straws including Sullivan, and was assisting Bridges in this effort. Scott said also that he told Pearson *he had no evidence* that these "straw" charges were well-founded (A. 90; T. 4-56 to 65).

Pearson and Scott made an agreement that Scott would supply Pearson with a copy of the Ballot Law Commission proceedings (T. 5-20, See A. 157, 158). Millimet had previously insisted upon introducing the "criminal" records of Sullivan, Robinson and McCarthy as part of that record (A. 80). And, although Mr. Millimet insisted that he never discussed with Scott what Scott was doing with Pearson (A. 78-80), Scott supplied Pearson with the Ballot Law Commission transcript and photocopies of *Millimet's* copies of the criminal records (A. 159 Compare Exhibits 18A and 19A with 18B and 19B). Thus Pearson was given *record verification* of the criminal records of everyone adversely commented on except Roy, and of the "straw" candidate controversy which resulted in Sullivan being found not to be a straw.

Pearson called Scott a second time August 25 or 26 (A. 156). He called Millimet between August 24 and August 27 (A. 160) and Millimet probably discussed "ticket balancing", Hill's chances, and the Ballot Law Commission proceedings (A. 161)

but said nothing about the "bootlegging", because he knew nothing of it. (A. 44, 45). If he discussed the "straw" and "Bridges" counts with Pearson *he warned Pearson that he had no facts to prove them* (A. 70).

Pearson knew and recognized that the sources for this anti-Roy defamation were Hill's political managers (A. 153, 171). His assistant talked to Senator Bridges but got no information (A. 148, 164).

Pearson also called Ralph LaVallee between August 24 and August 27, and injected Bridges' name into the call as indicated in the published column. (A. 156, 170). LaVallee and Roy were both emphatic, as was LaVallee to Pearson, that Bridges' name did not come up (A. 203, 204; 254-256). There was evidence that national columnists "throw in a big name to attract attention", and that Bridge's name would attract attention to the column whereas Roy's name would not (A. 304).

With *possibly* a further talk with one of his staff men, Fernsworth (A. 149-151, 163), this was Pearson's investigation of the "straw" and of the "Bridges" counts, and the story was complete August 27. He did not know Scott, Millimet, or LaVallee who were the informants. *He did not check Scott with anyone insofar as the "bootlegger" charge was concerned, and Scott was the sole source of this lie.*

Although the supposed facts were at hand not later than August 27, the story was not written up until September 7, and *was specially timed for publication September 10 "just before the election" of September 13* (A. 176-178). *Thus there was a period of 11 days available for checking the facts without impairing the "hot news" value of the libel.*

3. *The Bootlegger charge was intentional falsehood:*

Respondent has been prejudiced before this Court by Petitioners' having recited in their brief, as fact, evidence that was wholly disproven below. There is a difference between

evidence and proof, and with the findings of fact below presumed to support the verdicts, we state the facts presumably proven:

Scott was shown to be a liar, and the jury obviously did not believe him.

He was presented as a witness in the plaintiff's case, (A. 81-125) his deposition having been previously taken, for the purpose of having him tell the jury what he had told Pearson and what evidence he claimed to know to substantiate his "bootlegging" charge. *Every single item of such supposed evidence was then disproven through other witnesses.* (A. 138-139).

While Pearson said Scott related meeting Roy in a speakeasy (A. 162); Scott recanted on this before the jury (A. 97). Scott's *story* was that in 1928 or 1929 when he was in high school he and one Frankie Moran went to a speakeasy on Marion Street over a Chinese Laundry and bought a bottle and two drinks (See A. 96 to 119). "Shorty" Glaude and two others were there operating the speakeasy (A. 97). Scott claimed this was "Al Roy's" place—the respondent. The *proof was that Antonio Roy, no relation to respondent, was the only Roy connected with this speakeasy,* which in fact did exist on Marion Street over the Chinese laundry in the 1920's (A. 217-220).

Scott *said* that some time in the 1920's a man named Bourque lived on Alsace Street who was a part time bootlegger; he overheard Bourque tell his (Scott's) father that he got his supply from Al Roy—the respondent (See A. 105-109). Ulric Bourque was still alive; he did live on Alsace Street during the 1920's; he was a bootlegger; but *he did not buy his liquor from Roy and had no dealings with Roy with regard to liquor:* he got his supply in Lawrence, Massachusetts. (A. 138-140)

Scott buttressed these two lies with testimony that Roy confided to him privately at a much later time—on two occasions —that he had been a bootlegger (A. 92-96). Roy emphatically denied both conversations (A. 257). Additionally Scott was exposed as lying with regard to the first such supposed confidence, in that he was precise that on that occasion—the Manseau funeral—Roy was considering running for Mayor against Mayor Benoit whose popularity was thought to be waning (See A. 95). Benoit was Mayor for 10 years starting in 1945 (See A. 96). It was subsequently proven that the Manseau funeral was in 1943 (A. 123, 124). Scott was therefore obviously prevaricating on this one. The second supposed confidence was in 1948, while Roy was U.S. Marshal—hardly a likely tale.

Pearson's recollection of Scott's story to him (A. 162) sounded suspiciously as if Scott was romanticizing a 1923 episode in which respondent's brother, Manuel Roy was arrested, charged, and fined for possession of illegal liquor. On this occasion respondent Roy was taken to the station, but *not* charged with any offense, although the officers complained that he "interfered with an officer" (A. 126-128, 280-283). No one suggested at the time—1923—that Alphonse Roy was bootlegging.

The above is the *total* evidence on the charge that Alphonse Roy was a bootlegger, as a matter of fact. Roy denied it (A. 257), and the charge was proven false.

In New Hampshire there is a statute which permits evidence of "common report" to be admitted in defamation cases to mitigate damages (RSA 515:6 see A. 386-387) .Such "rumor" evidence was introduced and combatted.

All former liquor control and vice squad witnesses agreed that Respondent Roy was never on the suspect lists, there were no complaints about him, and his premises were never

searched. (Suosso, A. 125; Harbour, A. 204; Thirsk, A. 207; Moore, A. 309). Harbour heard rumors in 1932 that Roy had bootlegged (A. 206); Moore heard rumors that Roy was a bootlegger but recalled that *they had died out* long before Roy was elected to the Governor's Council in 1932. A former City Auditor recalled such gossip at City Hall while Roy was Alderman in 1931 (A. 307).

That no such rumors existed after 1932 is evidenced by the fact that active Democrat politicians such as Ryan (A. 196), Gauthier (A. 231); Early (A. 238), and even Millimet knew of no such rumors. Early was active from 1920 through 1962 and was State Chairman. Ryan was an opponent of Roy's from 1936 on. Millimet was active from 1948 to the date of trial and was a law partner of the State Chairman. The jury was entitled, on this evidence, to conclude that no "bootlegger" rumor was current for 30 years prior to the Pearson column.

It is in this context that the testimony of Enoch Shenton and Dion must be viewed. Dion claimed to have heard such rumors in 1956, when no one else heard them (A. 314). Shenton, attempting to justify his own conduct as Editor of the Monitor in not checking the "bootlegger" item, claimed to have heard, while Roy was a member of the Governor's Council that he had been and still was a bootlegger (A. 295-296). He then offhandedly added that the late Congressman Jenks told him *he* knew Roy was a bootlegger (A. 299). All of his sources were dead men. Since Dion and Shenton were demonstrated to be unworthy of belief on other testimony, the jury was entitled to, and presumably did disbelieve their testimony with regard to rumors after 1932. The most obvious refutation of this testimony is the fact that although Roy was in bitterly fought political campaigns in 1936, 1938 and 1944, no publication of such a charge was ever made until Pearson's column in 1960. (A. 300, 301).

4. *The Bootlegger Charge was private factual libel:*

In its opinion below, the New Hampshire Supreme Court correctly synopsized the evidence on the false bootlegger charge, and its view of the issue, as follows (See pp 16-17 of Petition):

> "The evidence fails to reveal that any prosecution for criminal activity of any kind was ever brought against Alphonse Roy. His only brush with the law was in January, 1923 when he was taken to the police station after a raid when he was present in a near beer parlor run by his brother. He was not charged with any violation and was released. This was 37 years before the publications here in question. Since prohibition ended in 1934, it is not probable that the bootlegger statement would be understood to refer to any activity within 26 years of the publication. Although there was evidence that there were rumors in the mid-twenties that plaintiff was a bootlegger, it was findable from the evidence that these had died out before he was elected to the Executive Council in 1932.
>
> "Although engaging in criminal activity even such as small-time bootlegging might be difficult to exclude from those things which affect fitness for office if it were alleged to have occurred recently its inclusion as a matter of law becomes less clear with the passage of a long period of time.
>
> "We are of the opinion that small-time bootlegging activity which occurred some 26 or 37 years in the past could be found to have lost its relevancy to prove the present fitness or unfitness of a candidate. The Trial Judge must have made this preliminary determination when he decided to submit the issue to the jury, *and the jury must have so found when they determined the defamation to have been a private one.*" (Italics added)

The evidence not only warranted the jury's conclusion, it virtually required it. Pearson was specific that "this was reported as a fact, yes" (A. 192), so was Monitor's publisher Jim Langley (A. 31). Pearson intended to make "a factual statement" (A. 193), as distinguished from an editorial comment. He had received this false information by telephone from Scott, whom he had never met and did not know, he made no check to verify the "bootlegging" report before publishing the accusation (A. 162, 171-172), *and didn't call Roy to confirm or deny because he expected Roy would deny it* (A. 171). Although Pearson had the false information about August 24-26, (A. 157), he deliberately delayed publication, and timed release just "before the election" (A. 176).

"Bootlegging" was intentionally used and was understood to mean illegal trafficking in liquor during the Prohibition era (A. 169, 28, 200, 226, 227, 228, 238). It was thus a charge of criminal activity. It in fact damaged Roy's reputation, being widely discussed and circulated (A. 31, 124-125, 196-197, 222, 230, 240-244). It also caused Alphonse Roy personal chagrin, shame and mental distress (See A. 260 to 262):

> "I was ashamed of myself. I hated to face people, having in mind that people knew that once upon a time I was a bootlegger . . . and I felt that this article . . . had succeeded to poison the minds of thousands of people, and I was really run down and I was hurt, and I felt that way for a long time." (A. 262).

Argument

I.

The Seventh, Ninth and Tenth Amendments to the Constitution of the United States do not Permit this Court to Nullify a Constitutional Jury Trial Providing a Constitutionally Guaranteed Remedy for Defamation by

Substituting Its View of the Facts Already Found by the Jury Below.

When we were previously before this Court in *Rosenblatt v. Baer*, 388 U.S. 75 (1966) we invited to the Court's attention that if *New York Times v. Sullivan*, 376 U.S. 254, were extended and interpreted as requiring trial *judges* to *rule as a matter of law* that every writing which contains reference to "matters of public concern" or which is published during a "public debate" is privileged, the result would be increased unjustified defamation with deterioration, rather than improvement, of the public debate on the conduct of public affairs. We also pointed out it has been recognized ever since the trial of *John Peter Zenger*, 17 Howells St. Tr. 675 (1735) that it is error for judges to determine that writings *are* libelous, and that by the same logic it would be error for judges to determine that they are *not*, where there are issues of fact raised as to the extrinsic facts upon which privilege is properly predicated.

Since then the extensions of the *Times* rule in the Courts below have virtually gone so far in some cases, and it is now argued seriously that it is error for the *judges* to substitute *their* views for the editorial judgment of the defaming writers or publishers (See Petition for certiorari in *Time, Inc. v. Wasserman*, October Term 1969, No. 1469, pp. 12, 14.

Under our Constitutional system there is no substitute for libel to deter irresponsible abuses of freedom of the press which take the form of false personal attacks, and the freedom was granted on these terms. It is incongruous, at least, in a period when charitable, governmental, and manufacturing immunities are being struck down to achieve more responsible conduct, that *Times* is being used to justify more irresponsible conduct by the press. It is illogical, at least, that this Court meticulously insists on observance of the constitutional safe-

guards provided to prevent persons from being unjustly accused, or convicted, of crime by public authority except upon some satisfactory proofs, while at the same time approving such accusations, and, yes, convictions, by the press on no proof at all—yet trial by newspaper is now argued as justification for *Times* application. See *Wasserman, supra,* at p. 23.

We believe it time to restore the intended constitutional balance and control, before we are confounded by our own Tower of Babel, and so, argue for proper reliance on the jury system.

The thrust of Petitioners' argument in this Court is that no jury can be permitted to find any facts in a libel case, if the plaintiff is a candidate for public office: that *anything* that a writer or publisher deigns to publish which defames a candidate "is always in the mainstream of public affairs" (Petitioner's Brief, p. 16). It is argued that "Accusations that a candidate is or was, even a long time ago, a deviant, a drunkard, a racketeer or a bootlegger are categorically relevant to fitness in office" even if wholly false (Id. pp. 18-19). It is further argued that *this* Court find no malice to have been shown—thus making all issues issues of constitutional law. If this Court accepts this argument, it can only do so in flagrant disregard of the limitations on its own powers delineated by the Constitution it interprets, and of the limitations on the powers of the United States specifically provided in both that Constitution and in the Constitutions of the several States, including the Constitution of the State of New Hampshire.

The Tenth Amendment (U.S.) acknowledges that powers not delegated to the United States by the (U.S.) Constitution nor prohibited by it to the States, are reserved to the States, or to the people. Article 7 of the New Hampshire Constitution's Bill of Rights reserves to the people all powers and rights of self-government not *expressly* delegated to the United States. Since the New Hampshire Constitution pre-dates the United

States Constitution, this reservation is valid.[1]

In the New Hampshire Constitution, adopted *before* ratification of the United States Constitution, the people *expressly* provided in Article 14 that every subject of the state is entitled to a certain remedy for injuries to "character", i.e. defamation, and further, by Article 20, that in such suits, the parties have a right to trial by jury. The same Constitution, in the same Bill of Rights, in Article 22, provides for liberty of the press. It is thus apparent that equal protection of law under the New Hampshire Constitution does not permit indulgence in the fallacy that freedom of speech or press is a constitutional right to be exercised at the expense of the rights of others to their reputation or character. Nor does Article 12 of the New Hampshire Constitution permit indulgence in the fiction that the reputation of *some* citizens must be sacrificed without compensation to permit the public press indiscriminately to broadcast defamatory falsehoods.[2]

The Ninth Amendment (U.S.) expressly requires that this Court neither deny nor disparage the right retained by the people of New Hampshire to have a remedy for injury to

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[1]"The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negociation, and foreign commerce; . . . . The powers reserved to the several states will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the state." *The Federalist* No. 45 (Madison) (Cooke ed. 1961). See also *The Federalist* No. 17 (Hamilton) (Cooke ed. 1961), *The Federalist*, No. 31 (Hamilton) (Cooke ed. 1961).

[2]The contemporary references to the fact that in the exercise of freedom of speech and press, some abuses must be expected, should be understood as intended at the time: *i.e.*, the fact that abuses would occur was not reason to impose prior restraint; the remedy of libel would make the press responsible, after the fact, for the abuse.

character. And the Seventh Amendment (U.S.) reads directly on Article 20 of the N.H. Constitution in requiring that the retained right to jury trial be preserved in both jurisdictions, and that facts found by juries as the triers of fact not be re-examined except in accordance with the rules of common law.

We additionally invite to the Court's attention Article 38 of the N. H. Constitution, which points out that the people have a right to require of magistrates an exact and constant observance of the fundamental principles of the Constitution, in this context: First Amendment (U.S.) or Article 22 (N. H.) protection of freedom of speech and press is *not* properly to be granted a superior position in the galaxy of reserved rights in derogation of or denial of the similarly reserved right of a jury trial remedy for injury to character.

Nor is the sovereign State of New Hampshire alone in thus recognizing and reserving to its people a remedy for defamation by jury trial. Massachusetts, Rhode Island, Maine, Connecticut, Delaware, Pennsylvania, and North Carolina, of the original 13 states have similar provisions, as do many other states which entered the Union later, such as Vermont, Alabama, and Arkansas. Delaware goes further and states that protection of character of its citizens is one of the fundamental duties of government.[3]

We therefore submit that this Court's comment that "libel" is merely an epithet of state law that can claim no talismanic immunity from constitutional limitations (*Times v. Sullivan*,

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[3]Massachusetts Const., Pt. 1, Art. XI; Rhode Island Const., Art. 1, §5; Maine Const., Art. 1 §19 see also §4; Connecticut Const., Art. 1, §10, see also §6; Delaware Const., preamble, Art. 1, §9, see also §5; Pennsylvania Const., Art. 1, §1 see also §7; North Carolina Const., Art. 1, §32; Vermont Const. Ch. 1, Art. 1; Alabama Const. Art. 1, §13; Arkansas Const., Art 2, §2.

376 U.S. 254 at 269) is error: the right to remedy for injury to character is a constitutional right of the citizens of New Hampshire (and of other states) which is entitled to recognition in this Court equally with the right of free speech and free press. These are competing *equally valid constitutional rights* which require accommodation, not one a step-child which can be abused by the favorite (See *Curtis Publishing Co. v. Butts*, 388 U.S. 130 at 147).

This Court's rationale that the (U.S.) Fourteenth Amendment imposed the (U.S.) First Amendment ("*Congress* shall not . . .) requirement on the states, even if it be a valid construction, added nothing to the reserved rights already provided by the New Hampshire Constitution's Articles 14 and 22 insofar as freedom of the press is involved. No legislative act—no action by the State—is here involved (*Times, supra,* at 265, to the contrary notwithstanding); this litigation is between private citizens, with Roy exercising his constitutional right to seek redress for injury to his character, and with a jury of his peers awarding him just compensation.

It is also germane, in view of the argument made here that journalism must be allowed to be irresponsible, *i.e.* freed from responsibility for injury to the character of citizens whom it defames, to invite the Court to recall that "freedom of the press" as conceived by the founding fathers, had no such connotation at all. Repeatedly in the State Constitutions which were adopted contemporaneously with the Federal Constitution, the liberty or freedom of the press was preserved with the express provision that those who exercised this freedom did so subject to liability for its abuse.[4] Freedom of the press

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[4]New York Const., Art. 1§8; New Jersey Const., Art. 1, §6; Virginia Const., Art. 1, §12; Maryland Const., Art. 40; Georgia Const., Art. 1, §1, para XV.

meant and still means solely total freedom from prior restraint; it is error to indulge in the fiction that subsequent responsibility for abuse of the freedom is the equivalent of such prior restraint.[5] Nor is the argument valid factually since the press has ample insurance available to protect its business interest in spreading defamation, of which it takes advantage, as in this case.

The Constitutional issue arises, we submit, only when the remedies made available by the states permit a civil remedy to an individual for publication of an impersonal attack on government—*i.e.*, permit the subversion of the retained right of the individual into a State-sponsored attack upon the press for seditious libel on the government itself. *New York Times v. Sullivan*, 376 U.S. 254, might well be considered such a case, *Goldwater v. Ginzburg*, 414 F2d 324 at 342 (1969). Whether in any given case the publication is an attack on government, by criticizing a "public official" for his "official conduct", or whether it is an attack upon the individual *under color of* criticizing his conduct of public affairs, is the test, and that test is a test that depends upon facts.

In most of the cases that this Court has decided in the *Times* line (*Times* itself, *Garrison*, *Henry*, *Walker*, *Bresler*) the Court has *assumed* the good faith of the publisher, that is,

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[5]"The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now." *South Carolina v. U.S.*, 199 U.S. 437, 449, 50 L. Ed. 261. "It is not only the same in words, but the same in meaning, and delegates the same powers to the government, and reserves and secures the same rights to the citizens, and so long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this Court, and make it a mere reflex of the popular opinion or passion of the day". *Scott v. Sandford*, 19 How. 393, 426, 15 L. Ed. 691.

that the publisher was exercising First Amendment rights rather than abusing them. In this case no such assumption is warranted.

In *Greenbelt Cooperative Publishing Association v. Bresler,* U.S. , 38 L. W. 4390, the newspaper articles complained of were contemporaneous, accurate, and truthful reports of what had been said at public hearings before a city council, embellished only by use of a subhead "blackmail". In contrast, here the excuse for the defamatory article was a hearing before a Ballot Law Commission, and the article was converted into defamation of Roy by reckless use of falsity, embellished by name dropping, and exaggerated into a national story. It was not published for the purpose of attempting to affect the result of the political contest (A. 194), but to sell Pearson's column, or, as Pearson claimed, to expose to the world that convicts were candidates for U.S. Senator in New Hampshire—and Roy was made a criminal for the purpose of selling the article.

There is no issue here that the "Bootlegger" charge was rhetoric, as in *Bresler,* or that anyone at the public hearing used such a charge or anything remotely akin to it: this was an intentional charging of a crime for no purpose related to the actual story being told, for no purpose related to Roy's candidacy—merely to categorize Roy as a convict to embellish the story. Three candidates with criminal records were not enough for Mr. Pearson, he created a criminal record for Roy to make the story better, and then adopted the insinuation that Roy was responsible for the filing of Sullivan (and so, of course, for the others)—the Fagin of the piece.

This is premeditation—intentional defamation—deliberately defaming an individual to make the story being told have more impact upon a reading audience other than the electorate before whom Roy was a candidate. This is *creating* an occasion to defame; making the facts fit the story, rather than attempt-

ing to tell it like it is.[6]

Roy, by his writ here, charged that the Pearson column was published maliciously, recklessly, and in bad faith for the purpose of defaming him, and that it in fact did defame him (A. 3, 4). The defendant Monitor, answering before *Times*, denied malice and intention to harm, and alleged a defense of (1) the truth, (2) a publication in good faith with a justifiable purpose on a lawful occasion, with reasonable belief in truth, (3) fair comment on common report, and (4) good faith republication with reasonable grounds of belief in truth (A. 6, 7). At pre-trial, after *Times*, the defenses asserted were (1) *Times* privilege and (2) truth. (A. 8). During the course of trial (after *Times*) both defendants joined in an amended answer, and asserted the defenses of (1) good faith publication on a lawful occasion without malice, (2) good faith publication on lawful occasion of the truth, (3) fair comment on common report, (4) republication with reasonable grounds of belief in truth, and added (5) they neither knew nor had any reason to know that the matters complained of were libelous and untrue. (A. 10-11).

On these pleadings the issues of fact were tried. Those issues included:

(1) Intentional defamation
(2) Falsity of defamation

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[6]This type of defamatory "jazzing up" of the story coupled with negligent failure to investigate was held sufficient to render an otherwise privileged writing actionable, both before *Times* and after, three times by the Seventh Circuit in *Pape v. Time, Inc.*, 318 F. 2d 652 (1963); 354 F 2d 558 (1965); third, 1969, decision unreported, see Appendix D to Petition for Certiorari in *Time, Inc. v. Pape*, October Term, 1969, No. 1309, and is the apparent reason for similar holdings in the "deliberate omission" cases, such as *Wasserman, supra* and its companion case *Ragano v. Time, Inc.*, 305 F. Supp. 1005, affirmed by the Fifth Circuit on June 2, 1970 as No. 28490 in that Court.

(3) Malice and recklessness
(4) Harm resulting from readers understanding the article in its intended defamatory sense.

On all of these issues, plaintiff Roy was charged with the burden of proof. While the "bootlegging" charge was ruled to be defamatory (A. 367), plaintiff was required to prove (and did) that it was intentionally used in its defamatory sense, and was so understood by readers (A. 368, 382). The *Times* defense was correctly charged, as it applies to "official conduct", nine times (A. 368, 369, 374, 375, 377, 378, 379, 380, 383), reemphasizing that plaintiff had the burden of proving falsity and malice if the libel were found to be in the public sector. In the private sector, the defense of truth as pleaded was charged (A. 376) as was good faith publication of falsehood on reasonable grounds of belief (A. 376-77), and fair comment (A. 379), and substantial truth was charged as a defense in *both* public and private sectors (A. 379). The shifting burden of proof on falsity was correctly charged (A. 381), but on the entire charge falsity was required to be found in order that plaintiff recover.

With these issues framed by pleadings, tried on evidence, and charged as issues to be found by the jury in reaching its verdicts, and with those verdicts having been returned in favor of Roy, on review according to the rules of the common law, all facts must be presumed to have been found which are necessary to sustain the verdicts, if there is evidence in the entire record to sustain the implied findings, and there is such evidence.

The basic findings of fact thus are:

(1) The "bootlegger" accusation was false, and was intentionally used in its defamatory sense and so understood.

(2) The publication of the "bootlegger" accusation did cause damage to Roy's reputation.

(3) The "bootlegger" accusation was a matter in which the public had no interest; it was not a matter which might touch on or be relevant to Roy's fitness for public office which should be brought to the attention of the public; it was rather a bringing forward of false forgotten rumors of misconduct (See A. 370, 373).

(4) The "bootlegger" accusation was not published in good faith without malice with good motives on a lawful occasion.

(5) The publication of the "bootlegger" charge was not based upon any reasonable belief in its truth, and was not fair comment.

(6) The "bootlegger" accusation was not substantially true.

With regard to this case, on this record, we submit that these facts must be taken as found by the jury, and this Court is not at liberty to substitute its view of these facts, or to adopt Petitioners' inconsistent view of these facts in disposing of the case.

II

The Court Below Correctly Applied New York Times v. Sullivan In Affirming The Trial Court's Submitting On The Evidence As A Question Of Fact To The Jury Whether Making An Irrelevant False Charge In 1960 That A Candidate For U.S. Senate Was "A Small Time Bootlegger" In The 1920's Was A Publication Entitled To Qualified Privilege Under New York Times or Whether It Was Purely Private Libel Beyond The Boundaries Of Factual Reporting On The "Official Conduct" Of The Candidate And Hence Beyond The Scope Of The New York Times Strictures.

The narrow issue sought to be reviewed here is succinctly explained and stated in the decision below (Petition, p. 15):

> "The main issue in the case as it comes to us, therefore, is whether the bootlegger part of the publication could be

found to be a purely private defamation and outside the constitutional protections of the New York Times rule which permits recovering only on proof that the publications were knowingly false or that they were false and were published with reckless disregard of the truth.

•••"We are of the opinion that small-time bootlegging activity which occurred some 26 or 37 years in the past could be found to have lost its relevancy to prove the present fitness or unfitness of a candidate. The Trial Judge must have made this preliminary determination when he decided to submit the issue to the jury, *and the jury must have so found when they determined the defamation to have been a private one.*" (Italics added.)

The specific point at issue here is whether, *in this instance* publishing an unverified, false, obviously defamatory charge of criminal conduct which was 26 to 37 years old, against a candidate for public office, was a publication in good faith for a justifiable purpose, or whether it was a publication under mere color of a lawful occasion, without good faith, where the protestation of acting for a justifiable end is made as a cover and pretense to publish and circulate defamatory material.

"Where, however, there is mere color of a lawful occasion, and the party, instead of acting in good faith, assumes to act for some justifiable end merely as a pretense to publish and circulate defamatory matter . . . he is liable in the same manner as if such pretense had not been resorted to." (*State v. Burnham*, 9 N. H. 34 at 41, 42, charged in this case at A. 384).

This is a question of fact, and was correctly left to the jury's determination.

The jury found that the bootlegging charge was not relevant to Roy's fitness for office, but rather a bringing forward of a

long forgotten false rumor in which the public had no interest. The evidence fully justifies that finding. The single fact that FBI checks on Roy in 1945 and 1949 in connection with his being appointed to the post of U.S. Marshall developed no reason to recommend against his appointment to that responsible law enforcement post, justifies the jury's conclusion, see T. 9-117 and T. 7-154 where Attorney Millimet says "*it wasn't a serious thing*, so they would have recommended"!! The witness William Moher, presented by the defense, acknowledged that such rumors as existed 43 to 44 years before were not current in the 1930's but had died out "long before that". Scott and Shenton, who testified to the contrary were demonstrated to be unworthy of belief, on this and on other items of testimony. The fact that Earley, Suosso, Thirsk, Gauthier, Ryan, Gay and Millimet knew of no such rumors over a period that covers 1926 to 1960 is indicative that no one considered over all these years that there was sufficient substance to the rumor to warrant using it openly. The fact that it was never reported in print, in spite of the 1936 Roy-Jenks battle and the 1944 Sheriff's race, is good evidence that there was no situation here that made this stale rumor relevant to Roy's qualifications for public office.

We would further invite to the Court's attention, that there was no relevancy to publishing the "bootlegger" charge in the September 10 column itself. The thrust of the article, as it related to Roy, consisted of repeating the already disproven charges that he arranged Sullivan's filing as a straw candidate, together with other straws, as a favor to Bridges in 1960. That story could have been told without throwing in the further gratuitous insult of the bootlegger charge. The bootlegger charge is foreign to the balance of the story, and constituted only a malicious defamation of one of the actors—Roy. (See T. 8-209 to 211). Journalistically, Pearson was discussing others

with criminal records, and, to put Roy in the same category, created a criminal record for Roy. See Pearson's explanation,

> "I deliberately put in the word 'later—'later U.S. Marshal'—because in the old days there were many people who were bootleggers. I know some very respectable big liquor dealers today, millionaires, who were bootleggers, but they've gotten over it, lived it down . . . Here Roy, apparently, if he became a United States Marshal, it was not held against him" . . .(A. 169).

This lame explanation by Pearson would justify the conclusion the jury reached on this issue. Even *he* assumed that the bootlegger charge was irrelevant to the 1960 campaign, but he used it, for no justifiable purpose, in reckless disregard for whether it was true or false, solely to defame Roy.

Petitioners do not dispute that the evidence justifies the jury finding; they argue that *Times v. Sullivan* precludes there being any factual issue. Essentially the Petitioners' position is that if a man stands as a candidate for U.S. Senate *anything* anyone writes about him is privileged. We do not so understand the law.

The *New York Times* rule has two requirements. It is only defamation (1) of a "public official" (whatever that may mean), (2) concerning his "official conduct" (whatever that may mean), that is protected. The type of publication toward which the constitutional protection is extended is "*criticism of official conduct*". The rule is:

> "A public official [cannot recover] damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' —that is, with knowledge that it was false or with reckless disregard of whether it was false or true." (376 U.S. at 279,280).

In footnote 23 (376 U.S. at 283) the Court goes to to say:

> "We have no occasion here to determine [1] how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule. . . . Nor need we here determine [2] the boundaries of the 'official conduct' concept."

Thus it is made clear that there are limits to both branches of the *New York Times* rule, and that *"there are boundaries" of the "official conduct" concept.*

Mr. Justice Goldberg's concurring opinion joined in by Mr. Justice Douglas refers to the intended boundary line, at p. 721 of 11 L. Ed.:

> "This is not to say that the Constitution protects defamatory statement directed against the private conduct of a public official or private citizen. ***Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment."

Our case of *Baer v. Rosenblatt,* 106 N.H. 26 (1964), was reviewed on certiorari for the express purpose of further defining the concept of "public official", *sub nominee Rosenblatt v. Baer,* 383 U.S. 75 (1966) (see footnote 12), without any consideration being given to the "public conduct" concept, because the libel was obviously related to Baer's supposed conduct in the employment he held. The case was remanded for trial because on the record already made, it was apparent that *the case might fall outside of the New York Times rule,* and that even if it were governed by the *New York Times* rule "respondent may be able to present *a jury issue* of malice as

there defined" (383 U.S. 87). The Court went on to "remark" that it was for the "trial judge" in the first instance to determine whether *the proofs show* respondent to be a 'public official' (italics added)."

Now, if proof of the existence of a "public official" status is factual, it seems equally clear that whether or not a false defamatory publication is within or outside of the "boundaries" of reports of "official conduct" is similarly an issue of fact to be decided on evidence.

Belli v. Orlando Daily Newspapers, Inc., 389 F. 2d 579 (1967) was disposed of by the Fifth Circuit precisely in this manner, and certiorari was denied by this Court on October 14, 1968 in No. 96, *Orlando Daily Newspapers, Inc. v. Belli.* In the *Belli* case the defendants published in a gossip column (Is Pearson's column anything else?), a 9 year old false story that Belli had "taken" the Florida Bar Association by charging hundreds of dollars worth of clothing to his hotel bill, which the Bar Association had agreed to pay in consideration of Belli's appearing on a panel at its meeting. Among the defenses asserted was the claim that Belli was a "public figure" (which was acknowledged by the Court) and that the item qualified under *Sullivan* and *Butts* as comment on his "official conduct." The Fifth Circuit reversed a lower court dismissal, and remanded the case for trial to jury. *Wisdom, J.*, speaking for the Court, said:

> "Not only must Belli be considered a public figure before the defendants can avail themselves of the *New York Times* privilege; *the matter covered by the publication must be of legitimate and substantial public interest. Thus a court* confronted with a defamation suit in which the defendant asserts the New York Times privilege *is compelled to make a dual inquiry* (1) whether the plaintiff is a public figure and (2) *whether the alleged de-*

> *famatory publication is directed toward his public conduct**** We conclude, therefore, that *the trial court is the proper arena for development of the relevant facts and resolution of the crucial issues in the first instance.*" (389 F. 2d 587, 588, italics added).

The Court went on, by footnote 15, to cite *Rosenblatt v. Baer's* "remark" as authority for this deposition.[7]

Insofar as this Court's "remark" in the *Baer* case that it is for the "trial judge" "in the first instance" to determine the issue is concerned, the "trial judge" in this case did so: he determined in the first instance that *findably* the "bootlegger" charge was not relevant to Roy's candidacy, and correctly left it to the jury to determine *on the facts* whether or not the charge did bear on Roy's fitness as a candidate.[8] This is the correct disposition of a disputed fact issue.

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[7]In addition to *Belli v. Orlando Daily Newspapers, Inc.* the following cases similarly appear to recognize a factual issue as to the extent of the "official conduct" concept of *New York Times v. Sullivan: St. Amant v. Thompson,* 390 U.S. 727; *Goldwater v. Ginzburg,* 261 F. Supp. 784 S.D., N.Y. 1966); *Tucker v. Kilgore,* 388 SW 2d 112 (Ky. 1964); *Eadie v. Pole,* 91 N.J., *Super* 504, 221 A2d 547 (1966); *Keogh v. New York Herald Tribune, Inc.,* 51 Misc. 2d 888, 274 NYS 2d 302 (1966); *Cabin v. Community Newspapers, Inc.,* 27 App Div 2d 543, 275 NYS 2d 396 (1966); *People v. Mager,* 25 App Div 2d 363, 269 NYS 2d 848 (1966).

[8]*Prosser* in *The Law of Torts* (relied on in *Butts*) concurs, at Section 95, pp 625, 623, that

". . . Qualified privilege does not extend . . . to the publication of *irrelevant defamatory matter* with no bearing upon the public or private interest which is entitled to protection" (p. 625)

"*It must rather be* directed and *confined to the facts which are matters of public concern, and not go beyond them, as by attacking the personal character. . . .*" (p. 623)

In this case the story which was a matter of public concern, though stale, was the straw candidate story—to which the bootlegger charge was irrelevant, not a matter of public concern, and a deliberate attack on personal character.

Plaintiff's position was made known at the outset below that there was no useful purpose in publishing in 1960 false gossip about a man in 1920 or 1930, and the relevance of Pearson's doing so to the issue of malice that destroys privilege was pointed out, (See T. 1-24), and maintained throughout trial (See T. 8-209 to 211, RC 18-21 to 26). The defense posture itself recognized that this was a dragging in of an irrelevant matter so old as to be without significance (T. 1-111, 112; see also T. 1-88; T. 7-84, 142), and Langley could think of no relevant purpose for this aspect of the publication. (A. 24).

This particular aspect of libel law—"the color of lawful occasion" subterfuge of character assassinators—has not yet been directly reviewed by this Court. In *St. Amant v. Thompson*, 390 U.S. 727, there is language which indicates that this Court recognizes that irresponsible publishers will take such advantage and attempt to claim *New York Times* protection, and that in such cases the jury need not believe their protestations. The following excerpt, we feel, applies generally to this case:

> "*The finder of fact must determine whether the publication was indeed made in good faith.* Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call." (390 U.S. at 732, italics added).

Here we see this Court recognizing that the *good faith* of the publisher of libel is a question of fact, and that his professions of good faith need not be believed. The corollary of this rule was recognized by the New Hampshire Court as early as *State v. Burnham*, 9 N.H. 34 and *Palmer v. Concord*, 48 N.H. 211: that the existence of a "lawful occasion" to publish depends upon the actual, factual *motives* of the publisher:

> "*A court cannot rule* that a communication is privileged without assuming the conditions on which it is held to be privileged, namely, that it was made in good faith, for a justifiable purpose. . . ." *Palmer v. Concord* at 217).

This rule has been uniformly followed in New Hampshire through *Lafferty v. Houlihan*, 81 N.H. 67 to *Baer v. Rosenblatt*, 106 N.H. 26. While *New York Times* carved out an area—"official conduct of public officials"—where it superimposes its First Amendment protection—in point of fact no case has yet been presented to this Court in which the existence of the lawful occasion on which the privilege is based was challenged. This case is therefore of first impression insofar as that aspect is concerned.

If we assume, *arguendo*, that Pearson's retelling the story of the straws and Bridges was germane to the 1960 campaign as a report (albeit a false one) of Roy's official conduct as a public candidate, and that the motives of the publishers were to "prevent the election of an unsuitable person to office" (*State v. Burnham* at 41), although Pearson denied this motive, that does not answer the further question whether bringing forward a stale false rumor of bootlegging was also germane. Roy's conduct *as a candidate* in 1960 may be admitted to be "official conduct" under *New York Times*. His supposed conduct as a private citizen in 1923 was as clearly not official conduct. Throwing the false 1923 "bootlegger" charge into the 1960 story was needless, heedless and not germane either to the 1960 campaign or to the story being told.[9] As Mr. Justice Fortas

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[9]The practical necessity of re-recognizing the "lawful occasion" rationale developed over the years by state decisions is interestingly demonstrated by our companion case of *Ocala Star-Banner Company v. Damron*, October Term, 1969, No. 1373, where a "wind-fall" privilege is claimed.

It is a basic journalism example that the publication that "Mary Smith gave birth to a child last night" is defenseless libel if the wrong Mary

said dissenting in *St. Amant v. Thompson*, 390 U.S. at 734, in another connection:

> "The First Amendment is not a shelter for the character assassinator, whether his action is heedless and reckless or deliberate. ***The public official should be subject to severe scrutiny and to free open criticism. But if he is needlessly, heedlessly, falsely accused of crime, he should have a remedy at law. *New York Times* does not preclude this minimal standard of civilized living."

Roy was, in this case, "needlessly, heedlessly, falsely accused of crime." Needlessly because the charge was not germane to the 1960 issues or to the story being told; heedlessly because neither petitioner concerned itself with the truth or falsity of the charge, and falsely on the evidence and finding of the jury.

The judgments should be affirmed.

Smith is identified, since the erroneous identification makes the story false, at least embarrassing, and if the wrong Mary Smith is single, extremely damaging. Similarly, a publication of a charge of crime becomes false where the wrong individual is indentified, and injury to reputation *does* result.

In *Damron* perhaps (although other arguments are possible) the publication was such an error. Properly viewed on that basis the "lawful occasion" would be the reporting of criminal court news, and the extraneous fact that Damron was also a public official would *not* create an "accidental" additional privilege. Nor should it, unless "public officials" are second-class citizens. The point is, simply, that publishers of defamation should *not* be entitled to claim a privilege which is not germane to their publication. The Fourth of July is a holiday, but it is not therefore a day upon which libels attacking patriotism are privileged because it is a lawful occasion. If, in the *Damron* case, the defense were timely pleaded that it was *intended* to defame Damron in his political contest, on these facts, would it not be an issue of fact whether that defense were honestly made? Or whether, after the fact, this intention is claimed to get "under color of" privilege? In the instant case, similarly, Pearson claimed he had no intention to affect the political contest in which Roy was a candidate; why therefore should his publishers get a "windfall" defense?

III.

If New York Times is Held to Apply in this Case, the Record Below Contains Evidence of New York Times Malice in the Sense of Reckless Disregard for Whether the "Bootlegger" Charge was True or False to Satisfy the Requirements of that Rule. In This Regard the Trial Court Erred in Not Charging the Malice of Pearson, the Writer, to Those Indemnified Distributors who Thereafter Published.

The New Hampshire Supreme Court sustained the verdicts as proper on the jury finding that the "bootlegger" publication was a private libel, and therefore refrained from reviewing, *as moot,* Roy's contention that the record includes sufficient proof of "actual malice" under the *New York Times* doctrine to sustain the verdicts even if the publication were found or held to have been in the public sector.

The record contains ample such evidence, and therefore, even if the judgments being reviewed were thought to be improperly based on the private sector rationale, they should not be summarily reversed, since they are sustainable alternatively because in the trial a sufficient showing of "actual malice" was made out, and on a new trial would be provable again. This aspect of the case is fully presented in Respondent's brief to the New Hampshire Supreme Court at pages 19-33 and in our Brief in Opposition to Petition for Certiorari in this Court, at pages 21-32.

We respectfully request that this Court review the record on malice and those arguments, as if the arguments were fully reprinted herein. We add to those arguments the following:

We distinguish *Butts* from *Walker* as this Court did on the basis that there was no "hot news" aspect to *Butts* (18 L. Ed. 2d at 1112) that excused responsible investigation of serious charges, as *was* the situation in *Walker.*

On the same line of demarcation, the *Roy* case is like *Butts*: the false "bootlegger" charge was made by Scott to Pearson on or before August 26 and the libel was published 15 days later on September 10. Although the "bootlegger" accusation was by telephone from a single source unknown to Pearson, unsupported by any other informant (like *Butts*) and the entire article's preparation was complete on August 27, *nothing was done, nothing was attempted, during the next 11 days before the libel was written to attempt to verify its accuracy.*[10] There was no "hot news involved—the public press in New Hampshire had previously reported fully on the *actual* facts that may have been germane to the political campaign then in progress. Its publication was timed just prior to the election only to increase its appeal to readers—not to affect the election.

In *Goldwater,* and in *Pape supra,* and in *Rosenbloom v. Metromedia,* 415 F 2d 892 (1969) (No. 947, October Term, 1969, in this Court), the Circuit Courts have recognized that while it is not realistic to require thorough research or verification of each individual item in a story where there is a "hot news" commercial necessity for speed, these considerations should not excuse reckless disregard when there is no such pressure. As the *Goldwater* opinion states:

> "The Goldwater Article did not contain 'hot news'; ***; the seriousness of the charges called for a thorough investigation but the evidence reveals only the careless utilization of slipshod and sketchy investigative techniques. . ." 414 F. 2d at 339.

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[10]A similar situation apparently exists in *Damron,* which involves an April 6 news item which was phoned in by an apparently responsible, known, source, but not published until April 18.

The same comment accurately applies to this case. If the petitioners or Pearson "had checked only casually he would have discovered" he was wrong. He published defamation deliberately "without interviewing or attempting to interview" Roy or any source other than Scott.

This conduct, unless this Court rules as a matter of law that Drew Pearson had infallible ESP abilities, is reckless disregard for whether what he wrote was true or false.

At least, in *St. Amant*, a written affidavit from the informer was relied upon. At least, the informant was known to the defamer and there was a basis for thinking him a responsible source. *This* "bootlegger" libel was based "wholly on an unverified . . . telephone call" (390 U.S. at 732), which this Court recognized in *St. Amant* would be profession of good faith that would be unlikely to prove persuasive to the finder of fact.

We therefore suggest that the jury here reached the right result, and a result which it probably would have reached under a *Times* charge, if Pearson's malice had been correctly charged to them. If the judgments are vacated, a new trial is therefore in order.

Conclusion

We submit that the decision of the New Hampshire Supreme Court correctly ruled that the jury's finding that the "bootlegger" libel was a private libel outside the "official conduct" concept of *New York Times v. Sullivan* was proper on the evidence in this case. For that reason, the judgements below should be confirmed. But if this Court expands, retrospectively, its "official conduct" concept to encompass such defamation, the Court should review *Respondent's* contentions that Pearson was shown to have written the libel with "actual malice" which was chargeable to these Petitioners, and which would sustain the judgments if the bootlegger charge is held to be subject to

the *New York Times v. Sullivan* requirements, and a re-trial should be ordered.

Respectfully Submitted,
BOIS & LAFLAMME and
MCLANE, CARLETON, GRAF,
GREENE & BROWN by
STANLEY M. BROWN,
Attorneys for Respondent
40 Stark Street
Manchester, New Hampshire